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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 299

CHESTER A. BOWLES, ONETIME ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, FOR AND IN BEHALF OF THE UNITED STATES, AND THE UNITED STATES OF AMERICA

v.

GEORGE F. WILKIE, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the petitioners, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on May 16, 1949.

OPINION BELOW

The memorandum of the district court (R. 17) is not reported. The opinion of the Court of Appeals (R. 27-32) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 16, 1949 (R. 33). On August 8,

1949, the Chief Justice extended the time within which to petition for a writ of certiorari to and including September 1, 1949 (R. 34). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the failure of a successor Price Administrator to be substituted as party plaintiff, within six months after his assumption of office, abates a treble damage action instituted by his predecessor on behalf of the United States.

2. Whether 28 U.S.C. 2105 precludes an appellate court from reviewing a judgment (a) denying a motion of the United States to be substituted as party plaintiff in a treble damage action instituted by a Price Administrator and (b) dismissing the action on the ground that it abated because of the failure of the Price Administrator's successor to be substituted as party plaintiff, in compliance with Rule 25 (d) of the Federal Rules of Civil Procedure, within six months after his assumption of office.

STATUTE AND RULE INVOLVED

28 U.S.C. 2105 provides:

> There shall be no reversal in the Supreme Court or a court of appeals for error in ruling upon matters in abatement which do not involve jurisdiction.

Rule 25 (d) of the Federal Rules of Civil Procedure provides:

> (d) *Public Officers; Death or Separation from Office.* When an officer of the United States, the District of Columbia, a state, county, city, or other governmental agency or any other officer specified in the Act of February 13, 1925, c. 229, § 11 (43 Stat. 941), U.S.C., Title 28, § 780, is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued and maintained by or against his successor, if within 6 months after the successor takes office it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining it. Substitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the Constitution of the United States. Before a substitution is made, the party or officer to be affected, unless expressly assenting thereto, shall be given reasonable notice of the application therefor and accorded an opportunity to object.

STATEMENT

This suit, a treble damage action for violations of price regulations issued by the Office of Price Administration, was commenced on May 22, 1945, by Chester A. Bowles, then Administrator of the Office of Price Administration, on behalf of the

United States. The complaint charged that respondents had sold potatoes and rendered services in connection with the negotiation of the purchase and sale of potatoes at prices in excess of applicable maximum prices; treble damages in the sum of $10,229.55 were sought. (R. 2-5.) On February 26, 1946, Chester A. Bowles resigned as Price Administrator and was succeeded by Paul Porter. On December 12, 1946, the Office of Price Administration was abolished, its functions under the Act were transferred to the Office of Temporary Controls by Executive Order No. 9809,[1] and Philip B. Fleming took office as Temporary Controls Administrator.

Executive Order No. 9841,[2] issued on April 23, 1947, provided for the termination of the Office of Temporary Controls. Executive Order No. 9842[3] also issued on April 23, 1947, provided that as of June 1, 1947:

> (1) The Attorney General is authorized and directed, in the name of the United States or otherwise as permitted by law, to coordinate, conduct, initiate, maintain or defend:
>
> * * * * *
>
> (b) Litigation against violators of regulations, schedules or orders relating to maximum prices pertaining to any commodity which has been removed from price control;

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[1] 11 F.R. 14281.
[2] 12 F.R. 2645.
[3] 12 F.R. 2646.

On June 10, 1947, the United States Attorney moved in the district court for substitution of the United States as party plaintiff (R. 9). On the same day, the defendants moved to dismiss or abate the action (R. 11-12). On June 10, 1947, the district court granted the Government's motion for substitution (R. 15), but thereafter, because of the indisposition of the judge, the cause was transferred to a second judge of the same court (R. 16). The latter vacated the first order, held that the action abated because substitution as party plaintiff by the succeeding Administrator had not been accomplished within six months after Chester A. Bowles' resignation, and dismissed it (R. 17-18).

From both these orders, an appeal was taken to the Court of Appeals for the Seventh Circuit (R. 19). That appeal was dismissed, the court holding that the district court had ruled on a matter in abatement and that Section 2105 of the new Judicial Code (28 U.S.C. 2105, *supra,* p. 2) precluded appellate review of such a ruling (R. 29). "In view of the fact that the Supreme Court might disagree with this conclusion" (R. 30), the Court of Appeals also went on to determine that the district court had correctly held that the action had abated because of the plaintiff's failure to comply with Rule 25(d) of the Federal Rules of Civil Procedure.

REASONS FOR GRANTING THE WRIT

1. The dismissal of the Government's appeal in this case has the effect not only of barring treble

damage action against the respondents arising out of their alleged over-ceiling sales but also of frustrating similar actions now pending in the Seventh Circuit.[4] At the same time, cases in other circuits, giving rise to precisely the same procedural questions as were decided below, have been allowed to proceed to decision on their merits. A situation of this sort requires the intervention of this Court.

Whether, in the light of the dismissal of the appeal, the decision of the district court, denying the right of the United States to be substituted and dismissing the action as abated, is to be deemed the controlling decision on these questions, or whether the agreement of the Court of Appeals with this action, announced because "the Supreme Court might disagree with" the court's conclusion on reviewability, is to be taken as a binding precedent for the circuit is of little consequence. In either event, there is a direct conflict on these questions with decisions of the Courts of Appeals for the Eighth and Tenth Circuits.

In *Fleming* v. *Goodwin,* 165 F. 2d 334 (C.A. 8), certiorari denied *sub nom. Goodwin* v. *United States,* 334 U. S. 828, the district court, as here, had denied the motion of the United States to be substituted as party plaintiff and sustained the

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[4] While the decisions of the courts below purport only to abate the particular action here involved (R. 29), further prosecution of the cause of action is precluded by the one-year statute of limitations applicable to treble damage actions. 50 U.S.C. App. 925 (e). This is almost universally true in O.P.A. treble damage actions and other proceedings subject to a limitation period as short as one year.

defendant's motion to dismiss and abate the treble damage action. These actions of the district court were reviewed and reversed by the Eighth Circuit, which ruled that the action was "in substance and reality, at all times a controversy between the Government and the appellees" and that a ruling of abatement would "glorify form over substance and reality". 165 F. 2d at 338.

The Court of Appeals for the Tenth Circuit, in *Northwestern Lumber & Shingle Co.* v. *United States,* 170 F. 2d 692, agreeing with the Eighth Circuit, also held that an action instituted by a Price Administrator did not abate, either upon the termination of his incumbency or that of his successor, and "that the order substituting the United States as party plaintiff was not an order reviving the action, but merely amounted to the substitution of the United States, the real party in interest, as the party plaintiff" 170 F. 2d 694. See also *Ralph D'Oench Co.* v. *Woods,* 171 F. 2d 112 (C.A. 8); *Seven Oaks* v. *Federal Housing Administration,* 171 F. 2d 947 (C.A. 4).

2. From what has already been said, it is plain that the dismissal of the appeal by the court below, on the ground that 28 U.S.C. 2105 precludes review over "matters in abatement", also conflicts in result with the course taken by the Eighth and Tenth Circuits, in reviewing orders equally susceptible of characterization as rulings on "matters in abatement." Indeed, the denial of review here is inconsistent with decisions of this Court in

which review has been accorded, and reversals entered, of lower court judgments in abatement. *Fitzpatrick* v. *Flannagan,* 106 U.S. 648, 660; *Fix, Collector of Internal Revenue* v. *Philadelphia Barge Co.,* 290 U.S. 530;[5] *Defense Corp.* v. *Lawrence Co.,* 336 U.S. 631. And while the jurisdictional issue decided below does not seem to have been raised as an obstacle to appeal in these other cases, this Court has said, in language having special pertinence here:[6]

> Even long continued practice cannot alter the limits within which Congress has bound the appellate jurisdiction of this Court. * * * *But such practice may be decisive in interpreting procedural ways which, as a matter of dialectic or abstract analysis, may appear dubious.* [*Italics supplied*]

3. That we have here, with respect to the meaning of 28 U.S.C. 2105, a problem "in interpreting procedural ways which, as a matter of dialectic or abstract analysis, may appear dubious"[7] is a proposition that is beyond the realm of debate. In *McHie* v. *McHie,* 78 F. 2d 351 (C.A. 7), relied upon by the court below, a studied attempt to under-

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[5] While, in the *Fix* case, the lower courts had sought to hold the cause of action and not merely the particular action abated, their ruling was in terms of abatement and would fall predecessors. Compare *Ryan* v. *United States,* 128 F. 2d 551 (C.A. 9) *infra,* pp. 9-10.

[6] *Commissioner of Internal Revenue* v. *Estate of Bedford,* 325 U.S. 283, 285.

[7] *Ibid.*

stand the purpose of the predecessor provisions of 28 U.S.C. 2105[8] was apparently found fruitless, the court expressing its difficulty in understanding the statute "notwithstanding its antiquity" and reluctantly giving it application only because it felt compelled to do so by what it considered controlling precedent. 78 F. 2d at 353. Until its reenactment by the new Judicial Code, there was, indeed, substantial doubt as to the provision's continued vitality. See editorial comment following 28 U.S.C.A. 879, and Appendix, *infra*, pp. 16-18.

As noted in *McHie* v. *McHie, supra*, 78 F. 2d at 353, "if [the statute] were so worded as to deny appeal from overruling of a plea in abatement, and the cause was then heard upon the merits, it would seem that there might be reason enough for denying a review of the ruling, since the judgment on the merits would still be subject to review. The seeming harshness of denying review where the plea in abatement was sustained and judgment was given against its pleader, makes one hesitate to apply to the statute the intent of denying review in such cases."

The harshness of such denial of review is, of course, emphasized when, as here, a new action on the same cause is precluded by the statute of limitations. See *supra*, pp. 16-18, note 4. And one

[8] This provision, in somewhat different form, appeared for the first time, in our law, in the first Judiciary Act, Act of September 24, 1789, c. 20, 1 Stat. 73, 84, Section 22. The Appendix, *infra*, pp. 16-18, sets out the text of the provision as it has appeared in its various forms.

court, at least, has found it possible to temper the statute read literally, by determining for itself whether the matter ruled on by the district court is, in reality one in abatement, and, finding it not to be, reversing the ruling on a plea denominated by the pleader as in abatement. *Ryan* v. *United States,* 128 F. 2d 551 (C.A. 9).

This Court has felt itself free to treat this provision as it appeared in the Revised Statutes and the old 28 U.S.C. 879 (Appendix, *infra,* pp. 17, 18) less literally than have some of the lower courts. Drawing for guidance on the provision in its original form in the First Judiciary Act, this Court ruled in *Buck Stove Co.* v. *Vickers,* 226 U. S. 205, 213, that it was never intended to apply to writs of errors to state courts, and in *Roche* v. *Evaporated Milk Association,* 319 U. S. 21, 27, 28, 29, that the provision did not operate to preclude review of rulings on pleas in abatement in criminal cases. These conclusions were reached despite the absence of exceptive language in the statutory provision before the Court in these cases.

We believe that reference to the First Judiciary Act will throw light also on the problem with which we are here concerned. Section 22 of that Act (1 Stat. 84) provided, in pertinent part,

> That *final decrees and judgments* in civil action in a district court * * * may be reexamined, and reversed or affirmed in a circuit court * * *. And upon a like process, may *final judgments and decrees* in civil actions, and suits in equity in a circuit court * * * be

> re-examined and reversed or affirmed in the Supreme Court * * *. But there shall be no reversal in either court on such writ of error for error in *ruling any plea in abatement*, other than a plea to the jurisdiction of the court, or such plea to a petition or bill in equity, as is in the nature of a demurrer, for any error in fact. [Italics supplied.]

The pattern and purpose of this provision seems clear; appellate review is to be accorded to "final" judgments and decrees, but is denied with respect to rulings on pleas which are not final in the sense that the party against whom the ruling is made may proceed further. A ruling which left no recourse but a new action, if available, would seem to be final in every sense of the word. For it would not seem to afford sufficient basis for denial of review that the party whose action has been abated might bring a new proceeding on the same cause of action, if he can overcome such jurisdictional, procedural, and limitation obstacles as may have arisen in the meantime. Certainly, there is no reason to impute to the first Congress a purpose to deny appellate review of rulings, which leave no recourse but a problematical new action. It follows, here, we think, that the district court's judgment of dismissal cannot be denied review on the basis of 28 U.S.C. 2105, read, as it must be, in the light of the provisions of the statute from which it is derived. *Buck Stove Co.* v. *Vickers,* 226 U. S. 205, 213; *Roche* v. *Evaporated Milk Association,* 319 U. S. 21, 27, 28, 29.

The rulings of this Court are entirely consistent with the Government's reading of 28 U.S.C. 2105, as denying review only to what may loosely be termed interlocutory rulings. In *Leitensdorfer* v. *Webb*, 20 How. 176, the Court, after stating that the proceeding there involved was "in reality a proceeding in abatement," went on to say (20 How. at 185-186):

> It is true, that by the practice of the State courts the preliminary proceedings upon the petition and affidavit, and any questions of law ruled by the courts in those proceedings, are carried for review to the tribunals of last resort. But this is a practice authorized by the States under their peculiar jurisprudence. The States possess an undoubted power to permit or to require of their courts the re-examination and control of proceedings in their own tribunals, entirely interlocutory in their nature. The appellate or revisory power of this court, as defined by the Constitution and laws of the United States, is more restricted in its extent than that with which some of the States have invested their courts. By the twenty-second section of the act of Congress to establish the judicial courts of the United States, it is declared that *final* judgments and decrees in civil actions and suits in equity in a Circuit Court, brought there by original process, or removed there from the courts of the several States, or from a District Court, where the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs, may be examined, and reversed or affirmed, in the

> Supreme Court. But there shall be no reversal for error in ruling any plea in abatement other than a plea to the jurisdiction of the court, or such plea to a petition or bill in equity, as is in the nature of a demurrer.
>
> From this provision in the act of Congress it follows, that the preliminary proceeding in the District Court of the Territory, being in its nature interlocutory, and designed to abate the particular remedy by attachment only, and having no application to the plaintiff's right to a recovery of his demand, or to the jurisdiction of the Territorial court, either as to the parties or the subject-matter of the controversy, that proceeding comes not within the appellate or revisory power of this court.

And in *Fitzpatrick* v. *Flanagan,* 106 U. S. 648, 660, it was again pointed out, though without specific reference to the statute with which we are here concerned, that though a ruling on a plea in abatement "is not final in the sense that it may be reviewed before the final determination of the cause," it is reviewable when and because "a writ of error upon the final judgment brings up the whole record."

Those decisions of this Court which have applied the statute to deny review are cases in which it had been pleaded in abatement that another action was pending for the same cause in another court. *Piquignot* v. *Pennsylvania R. Co.,* 16 How. 104; *Stephens* v. *Monongahela Bank,* 111 U. S. 197. There, unlike the situation at bar, the ruling

in abatement "is one which merely defeats the present proceeding, and does not conclude the plaintiff forever, either as to his right to sue in the Circuit Court of the United States, or as to the merits of the matter in dispute." *Stephens* v. *Monongahela Bank, supra,* at 198.

The denial of review is thus understandable in situations of this sort as it was when a bill of revivor was ultimately available to the plaintiff against whom a ruling in abatement had been entered, or his successors (*Ex parte Slater,* 246 U. S. 128, 133-134), or when a statutory right to revive was accorded in certain actions at law. See, *e.g.,* Section 31 of the Judiciary Act of 1789, 1 Stat. at 90. When, in these situations, a ruling in abatement worked nothing more than a temporary suspension of the action, review might well have been denied for lack of finality of the order. But the denial of review in the situation at bar has no such justification. A ruling of abatement for failure to make timely substitution puts an end to the action; the fixing, by the Federal Rules, of periods during which substitutions may be had, does not leave open the possibility of subsequent revivals of the action. If the contrary were true, the time limitations imposed by the Rules would be gestures "of futility." *Defense Corp.* v. *Lawrence Co.,* 336 U. S. 631, 636. Thus, it may be that so far as abatements that result from a failure to make timely substitutions are concerned, the statutory denial of review was made obsolete by the Federal Rules of Civil Procedure. In any event, this Court should review the

denial of review by the court below since there is serious doubt as to whether Congress ever intended questions, important to the parties and to the Nation, to be finally decided by a trial court in a manner that may be wholly inconsistent, as it is here, with rulings of other courts of higher rank in the federal judicial system.

4. Both the question of the abatement of the action and that of the reviewability of the ruling of abatement are important. The failure to substitute a successor public officer within the time provided by the Federal Rules has given rise, and will continue to give rise, recurrently, to such questions. See, *e.g.*, *Hiatt* v. *Smith*, 336 U. S. 908; *cf. Defense Corp.* v. *Lawrence Co.*, 336 U. S. 631. The importance of the questions is not gainsaid by the fact that but for the neglect of a federal attorney or a less than cautious judgment as to the inapplicability of the Rules, they would not arise. The fact is that these things happen. The magnitude of Government litigation and the special problems of conducting it in times of stress, such as confronted the O.P.A., serve to make understandable their inevitability.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

AUGUST, 1949.

APPENDIX

Act of September 24, 1789, First Congress, Sess. I, c. 20 (1 Stat. 73, 84)

Sec. 22 *And be it further enacted,* That final decrees and judgments in civil actions in a district court, where the matter in dispute exceeds the sum or value of fifty dollars, exclusive of costs, may be re-examined, and reversed or affirmed in a circuit court, holden in the same district, upon a writ of error, whereto shall be annexed and returned therewith at the day and place therein mentioned, an authenticated transcript of the record, an assignment of errors, and prayer for reversal, with a citation to the adverse party, signed by the judge of such district court, or a justice of the Supreme Court, the adverse party having at least twenty days' notice. And upon a like process, may final judgments and decrees in civil actions, and suits in equity in a circuit court, brought there by original process, or removed there from courts of the several States, or removed there by appeal from a district court where the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs, be re-examined and reversed or affirmed in the Supreme Court, the citation being in such case signed by a judge of such circuit court, or justice of the Supreme Court, and the adverse party having at least thirty days' notice. But there shall be no reversal in either court on such writ of error for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or such plea to a

petition or bill in equity, as is in the nature of a demurrer, or for any error in fact. And writs of error shall not be brought but within five years after rendering or passing the judgment or decree complained of, or in case the person entitled to such writ of error be an infant, *feme covert, non compos mentis,* or imprisoned, then within five years as aforesaid, exclusive of the time of such disability. And every justice or judge signing a citation on any writ of error as aforesaid, shall take good and sufficient security, that the plaintiff in error shall prosecute his writ to effect, and answer all damages and costs if he fail to make his plea good.

In the 1873 revision entitled "Revised Statutes of the United States," Section 22 of the original Act was divided into several parts. The provision limiting review on writ of error was entitled R. S. 1011 and provided:

> There shall be no reversal in the Supreme Court or in a circuit court upon a writ of error, for error in ruling and plea in abatement, other than a plea to the jurisdiction of the court, or for any error in fact.

The word "any" was inserted by Act of February 18, 1875, Chapter 20, Section 1, 18 Stat. 318, in place of the word "and" appearing in the section as originally enacted after the word "ruling."

This provision was not included in the revision of the Judicial Code of 1911, Act of March 3, 1911, 36 Stat. 1087. However, it was not specifically repealed. The provision appears in the United

States Code of 1926, 28 U.S.C. 879, and provides:

> There shall be no reversal in the Supreme Court or in a circuit court of appeals upon a writ of error, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or for any error in fact.

In the 1948 revision of the Judicial Code this provision became section 2105, Title 28 U.S.C., which provides:

> There shall be no reversal in the Supreme Court or a court of appeals for error in ruling upon matters in abatement which do not involve jurisdiction.

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IN THE

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Petitioner),

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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CHESTER A. BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, FOR AND IN BEHALF OF THE UNITED STATES,

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

OPINION BELOW.

The opinion in the Court of Appeals (R. 27-32) is reported at 175 F. (2d) 35.

QUESTIONS PRESENTED.

1. Is the judgment dismissing the action on the ground that it abated reversible in view of the provision of the revised Judicial Code (28 U. S. C. § 2105) that:

> "There shall be no reversal in the Supreme Court or a court of appeals for error in ruling upon matters in abatement which do not involve jurisdiction."

2. If the judgment is reversible, did the failure of plaintiff's successor to be substituted within six months after taking office, as required by Rule 25(d) of the Rules of Civil Procedure, abate the action?

Neither question seems sufficiently important to merit consideration by this Court. The first involves a statutory limitation upon review of errors by federal trial courts in effect since 1789. Petitioner complains of the harshness of applying this statute to the district court's ruling abating the action (Ptn. 9) but does not challenge the one-year statute of limitations[1] which creates that "harshness" by barring a new action (Ptn. 6, fn 4). The second question was settled by the unanimous opinion of this Court in *Defense Supplies Corporation* v. *Lawrence Warehouse Company,* 336 U. S. 631 (1949), holding under a statute parallel to Rule 25(d) that where a successor is not substituted within the prescribed time the action abates at the end of that period. The Court of Appeals expressly followed the *Lawrence Warehouse* case (R. 31) and petitioner has not attempted to distinguish it.

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1. 50 U. S. C. A. App. § 925(e).

STATEMENT OF THE CASE.

Petitioner's statement is incomplete. No successor to Bowles ever applied to be substituted as plaintiff, although Rule 25(d) permits substitution of the successor of a public officer if application showing the need to continue the action is made within six months after taking office. Porter was in office nine months after succeeding Bowles, and Fleming held office over five months after succeeding Porter, but neither applied for substitution. After Fleming, no successor has existed; Executive Order No. 9842 (Ptn. 4) directed the Attorney General to continue price cases "in the name of the United States," but appointed no successor to the Price Administrator.[2] The motion to substitute the United States (R. 9) was made pursuant to this executive order, not under Rule 25(d).

The District Court held (R. 17) that the action had abated and dismissed the case (R. 18). The Court of Appeals dismissed the appeal on the ground that the ruling on abatement is not reversible under Section 2105, and held that in any event the abatement ruling was correct under Rule 25(d), since the plaintiff's successor was not substituted within the prescribed period (R. 27-32). Judges Minton and Duffy concurred in the opinion of Judge Lindley, which sets forth the views of the court with clarity.

2. § 205(e) of the Emergency Price Control Act (50 U. S. C. A., App. § 925(e)), provides that if the buyer fails to bring a treble damage action for price violation, "the Administrator may institute such action on behalf of the United States within such one year."

ARGUMENT.

Petitioner contends, *first*, that Section 2105 is inapplicable, and that consequently the judgment is reversible, and *second*, that certiorari should be granted because of a conflict with abatement decisions in the Eighth and Tenth Circuits.[3]

1. There Is No Conflict With Abatement Decisions in Other Circuits.

It would seem essential for the allowance of certiorari in this case that there be an actual conflict between the abatement decision of the courts of the Seventh Circuit in this case and abatement decisions of the Eighth and Tenth Circuits. We turn to this question first, since we believe the answer is short and conclusive that no such conflict exists at the present time, and, this being so, it is unnecessary to consider whether Section 2105 is applicable.

(a) *The statements of the Eighth and Tenth Circuits on abatement were dicta.* The Court of Appeals below distinguished the two cases petitioner claims to be in conflict with the decision on abatement in the case at bar, pointing out that in *Fleming* v. *Goodwin* (CA 8), 165 F. (2d) 334, cert. den., 334 U. S. 828, the administrator's successor filed a motion for substitution within the six-month period prescribed by Rule 25(d), and that in *Northwestern Lumber & Shingle Co.* v. *United States* (CA 10), 170 F. (2d) 692, the administrator's successor had complied with Rule 25(d) at the time judgment was entered (R. 31-2). However, the courts in those cases (by way of dicta, we submit)

3. *Fleming* v. *Goodwin* (C. A. 8) 165 F. (2d) 334, cert. den. 334 U. S. 828, and *Northwestern Lumber & Shingle Co.* v. *United States* (C. A. 10) 170 F. (2d) 692.

did state that the actions did not abate because of the failure of the successor administrator to be substituted.

(b) *In any event conflict cannot be predicated upon a court of appeals decision which follows the latest expression of this Court on the subject and which necessarily overrules prior court of appeals decisions of other circuits in conflict therewith.*

There is no present conflict between these decisions of the Eighth and Tenth Circuits and those of the Seventh Circuit in this case on the question of abatement, since the former, in so far as they decide anything to the contrary on the question of abatement, by way of dicta, or otherwise, have been plainly overruled by the subsequent decision of this Court in *Defense Supplies Corporation* v. *Lawrence Warehouse Company*, 336 U. S. 631 (decided April 18, 1949). There this Court held under a substitution statute closely parallel to Rule 25(d), that failure to substitute the successor to the plaintiff within the period specified abates the action upon the expiration of such period. This Court unanimously stated at page 636:

> "We do not think Congress intended a gesture of futility when it stated a twelve-month period for substitution. • • • If Reconstruction Finance is not substituted within one year, the action • • • is • • • at an end • • •."

It would seem equally clear that this Court did not intend a gesture of futility in adopting Rule 25(d) of the Rules of Civil Procedure.[4] Petitioner apparently concedes that the *Lawrence Warehouse* decision is also applicable to the abatement of cases under Rule 25(d) for failure of the successor to be substituted within the prescribed period. On page 14 of the petition, it is stated:

4. Compare Rule 19(4) of the Revised Rules of this Court governing substitution of public officers, which applies the same policy as Rule 25(d).

> "A ruling of abatement for failure to make timely substitution puts an end to the action; the fixing, by the Federal Rules, of periods during which substitutions may be had, does not leave open the possibility of subsequent revivals of the action. If the contrary were true, the time limitations imposed by the Rules would be gestures 'of futility.' *Defense Corp.* v. *Lawrence Co.*, 336 U. S. 631, 636."

To the extent that the *Fleming* case (165 F. (2d) 334) and the *Northwestern* case (170 F. (2d) 692) state that the action did not abate for failure to substitute a successor within the six-month period prescribed by Rule 25(d), they are no longer the law in the Eighth or Tenth Circuits, and there now is no conflict between circuits on this point (if there ever was one, which is doubtful). Consequently, there is no need to grant certiorari on the question of whether the abatement ruling is reversible under Section 2105, since the granting of the writ would only lead to affirmance of the district court's judgment.

2. Section 2105 Precludes Reversal.

Apart from the correctness of the district court's ruling on abatement under Rule 25(d), it is submitted that certiorari should be denied because of 28 U. S. C., § 2105.

Petitioner does not challenge the holding of the Court of Appeals (R. 29) that the granting of defendant's motion to dismiss or abate (R. 18) was a "ruling upon matters in abatement." Petitioner apparently also concedes that Section 2105 on its face would preclude reversal, but argues (a) that the Seventh Circuit in *McHie* v. *McHie*, 78 F. (2d) 351, had difficulty in understanding the predecessor statute (Ptn. 9); (b) that the statute is harsh as applied here because a new action is precluded by the statute of limitations (Ptn. 9); and (c) that in the light of its statutory progenitor, Section 2105 should be inter-

preted to deny appellate review only when the losing party may proceed further (Ptn. 11).

The reenactment of this provision as a part of the revised Judicial Code indicates a Congressional intent that it should continue as one of the important boundary posts delineating the field of federal appellate court functions. Especially is this true in the light of the excellence of the advisory work on this revision, so well described in *Ex parte Collett*, 337 U. S. 55, 65-71 (May 13, 1949).[5] From the standpoint of this case, the significant changes in the provision are, *first*, a broadening of the reversal prohibition to cover the more general "matters in abatement" in lieu of "pleas in abatement," and *second*, the insertion of the word "upon" after "ruling" apparently because of the criticism of this omission by the Seventh Circuit in *McHie* v. *McHie*, 78 F. (2d) 351 (see Ptn. 8-9).

This Court held in *Fix* v. *Philadelphia Barge Co.*, 290 U. S. 530, 533, that failure of a successor collector of internal revenue to make timely application for substitution "forecloses the particular remedy * * *; it does not destroy the right." Thus, it is apparent that any possible "harshness" (Ptn. 9) in applying Section 2105 arises from a purely collateral matter, *i. e.*, the one-year statute of limitations. This Congressional limitation upon the period of possible liability should not be circumvented by asking that Section 2105 and Rule 25(d) be interpreted contrary to their clear language and the previous decisions of this Court. Such statutes and rules are designed to apply in-

5. The reviser's brief notes on Section 2105 were submitted with the final draft of the bill in both the House and Senate. There was no discussion of this section in either the House or the Senate at the time of reenactment. See 28 U. S. C. (1948), Congressional Service, pp. 1675, 1692, 1986-2018, 2019-2029, 2030-2040. An examination of the Annals of Congress, the Congressional Globe and the Congressional Record disclosed no discussion in Congress of § 22 of the Judiciary Act of 1789 and R. S. 1011, the statutory predecessors of 28 U. S. C. § 2105.

dependently of collateral matters, such as the possibility that there may be a valid defense to a subsequent action.

Since Section 2105 is unambiguous and has been so recently reenacted by Congress, it would seem unnecessary to refer to Section 22 of the Judiciary Act of 1789 (1 Stat. 84) from which it is derived (Ptn. 10). However, Section 22, when analyzed, fails to support petitioner's argument that Section 2105 is inapplicable unless the losing party may proceed further.

The difficulty with this contention stems from the supposition that the third sentence of Section 22 forbidding reversal "for error in ruling any plea in abatement" operated only where the judgment was not final. However, the section as a whole is not subject to such an interpretation. The first two sentences of the section conferred appellate jurisdiction of civil cases from lower federal courts only where there had been a *final judgment* or decree; until a final judgment was entered, no error of any sort could be reviewed by the appellate courts. However, from the earliest days this Court has held that a judgment which terminated the particular action but not the rights of the parties was "final," *Weston* v. *City Council of Charleston*, 2 Pet. (27 U. S.) 449, 464.[6]

The first two sentences of Section 22 did not define the *errors* for which such final judgments might be reversed, but rather provided for "reexamination, and reversal or affirmance." In sharp contrast, the third sentence of Section 22 specifies types of *error* for which reversal was prohibited. Unless there were a "final judgment," the

6. This Court has followed the interpretation stated in the *Weston* case on many occasions. See *Rescue Army* v. *Municipal Court of Los Angeles*, 331 U. S. 549, 565; *Detroit & Mackinac Railway Co.* v. *Michigan Railroad Commission*, 240 U. S. 564, 570-1; *Wilson* v. *Republic Iron & Steel Co.*, 257 U. S. 92, 96; *Mt. Vernon-Woodberry Cotton Duck Co.* v. *Alabama Interstate Power Company*, 240 U. S. 30, 31; *Central Transportation Company* v. *Pullman's Palace Car Co.*, 139 U. S. 24, 40.

appellate court would have no jurisdiction to review in accordance with the first two sentences. Once a case was properly in an appellate court there might be reversal for error, but under the third sentence "on such writ of error" there could not be reversal "for error in ruling any plea in abatement."

Thus, it is clear that where a final judgment has been entered, an appeal may be taken and the reviewing court may consider any prejudicial errors which may have contributed to that judgment, provided they are not errors in "ruling upon matters in abatement." Obviously, there might be other errors. *Leitensdorfer* v. *Webb,* 20 How. (61 U. S.) 176 (Ptn. 12) illustrates the distinction. There a plea in abatement on the ground that the attachment affidavit was insufficient was overruled and, after a trial on the merits, plaintiff obtained judgment. On writ of error, this Court held that section 22 prohibited reversal because of the ruling on the plea in abatement and, since the defendant failed to show error in the trial on the merits, this Court affirmed the judgment.

Wherever the provision against reversal for error in abatement rulings has been invoked, this Court has applied it. In *Stephens* v. *Monongahela Bank,* 111 U. S. 197, this Court affirmed a judgment on a ruling in abatement on the basis of the statute, saying at page 198:

> "* * * it is expressly provided that there shall be no reversal in this court or the Circuit Court for error in ruling any plea in abatement * * *. The defence is one which merely defeats the present proceeding, and does not conclude the plaintiff forever, * * *."

In *Piquignot* v. *Pennsylvania R. R. Co.,* 16 How. (57 U. S.) 104, the defendant pleaded in abatement that another suit was pending in the state court. The trial court overruled the plaintiff's demurrer to the plea and entered judgment for the defendant, which was affirmed by this Court, which said on page 104:

> "The judgment of the court below on the plea is not subject to our revision on a writ of error."

To the same effect are *McHie* v. *McHie* (CA 7), 78 F. (2d) 351, *Marinette Sawmill Co.* v. *Scofield* (CA 7), 174 F. 562, *Barnsdall* v. *Waltemeyer* (CA 8), 142 F. 415, and *Cunningham* v. *Rodgers* (CA 9), 171 F. 835.

It is significant that petitioner cites no decisions casting doubt upon the meaning of Section 2105, or its predecessors, other than the criticism of the omission of the word "upon" after the word "ruling" mentioned in *McHie* v. *McHie* (CA 7), 78 F. (2d) 351, 353, which Congress cured by the addition of the missing word in Section 2105. *Fitzpatrick* v. *Flanagan,* 106 U. S. 648 (Ptn. 13), like several other cases, was decided without reference to the statutory predecessor of Section 2105. *Buck Stove Co.* v. *Vickers,* 226 U. S. 205 (Ptn. 10) and *Roche* v. *Evaporated Milk Association,* 319 U. S. 21 (Ptn. 10) were both decided on the basis of express limitations in the language of Section 22 of the First Judiciary Act which restricted its application to a review of decisions in the federal courts and to civil cases. Neither of these decisions throw the slightest doubt on the application of Section 2105 to a civil case decided by a federal district court, as in the case at bar.

Conclusion.

Like the statute of limitations, Section 2105 and Rule 25(d) are designed to prevent the annoyance of parties by indefinitely drawing out the period of litigation. It is submitted that the policy behind both the statute and the rule are sound, and that they should be applied equally to all litigants.

It is submitted that there are no questions of sufficient importance or doubt to warrant the granting of certiorari; that there is no present conflict between circuits; that the

rule and statute involved are clear and were correctly applied by the courts below. Respondents suggest that certiorari should be denied.

Respectfully submitted,

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